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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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PR Docket No. 93-144  
RM-8117, RM-8029  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Amendment of Part 90 of the Commission's )  
Rules to Facilitate Future Development of )  
SMR Systems in the 800 MHz Frequency Band )

and

Implementation of Section 309(j) of the )  
Communications Act -- Competitive Bidding )  
800 MHz SMR )

PP Docket No. 93-253

To: The Commission

COMMENTS

August Bert Carver t/a Action Radio (Carver), by his attorneys, hereby submits his Comments in the above-captioned matter. Carver opposes the adoption of the proposals contained within the FNPRM. Insofar as Carver's Reply Comments to the matter from which this FNPRM was derived are relevant, those Reply Comments are hereby incorporated herein, see, attached.

Carver would like to voice his opposition to the Commission plan to divide the country along Metropolitan Trading Area lines and auction 200 of the currently-allotted SMR frequencies to the winning bidder. It is Carver's belief that such a

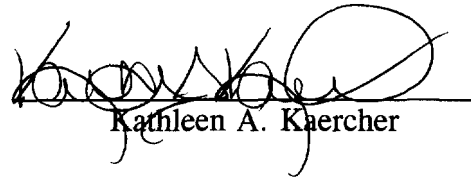
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plan is impractical and unworkable, and if attempted, would injure the already established SMR industry.

Respectfully submitted,  
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By



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Dated: January 5, 1995

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Sections 3(n) and 332 )  
of the Communications Act )  
 )  
Regulatory Treatment of Mobile Services )

GN Docket No. 93-252

To: The Commission

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JUL 11 1994

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

REPLY COMMENTS

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## SUMMARY

The basis for Nextel's proposal is fatally flawed from the outset. Nextel, still inherently an SMR operator, chooses to be placed on a level playing field with services which were not designed or intended to compete directly with SMR operations. Were the Commission to determine that parity of the kind proposed by Nextel was reasonable and necessary, then the Commission must extend full parity.

The reallocation of spectrum and creation of exclusive markets would require that Nextel compete with other applicants to provide the new service; and where such applications are found to be mutually exclusive, the Commission must hold an auction.

The result of the Commission's grant of a waiver to Nextel was a flood of applications, claiming frequencies for some future speculative use. Nextel and other ESMR operators also began an aggressive program of short spacing, further cutting into traditional SMR markets. Money poured into the ESMR coffers from public offerings, equity deals with multi-billion dollar corporations, overseas money from Japanese manufacturers, and any other well-heeled sources that could pony up a few hundred million to be part of the ESMR phenomenon. What occurred was not the provision of service to the public, but rather a trading in spectrum and a whirlwind of investment that was intended to produce stock sales and security deals more than build a viable radio service. Now Nextel admits that its technological design is not as good as the Commission had been lead to expect when it granted its waiver.

Neither the Commission nor traditional SMR operators should be put in a position of guaranteeing Nextel's success. The Commission should not be moved to assist this entity who has, thus, demonstrated that its claims are without foundation and whose technical abilities are beneath their estimations. Action recommends that the Commission allow the marketplace to solve Nextel's newest woes.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332	)	GN Docket No. 93-252
of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS

August Bert Carver t/a Action Radio (Action), by and through counsel, hereby provides reply comments in the above captioned proceeding. In particular, Action hereby opposes Nextel Communications, Inc.'s (Nextel) proposal to force frequency exchanges between ESMR carriers and analog SMR operators; and Nextel's proposal to consolidate exclusive control of ESMR facilities within MTAs. Such action by the Commission would create such upheaval in the marketplace, without concurrent value to the public, as to create a competitive behemoth, unprecedented in the history of wireless communications.

Action has been in the business of providing analog SMR service in the Washington, DC area for many years. It has a great interest in the outcome of this proceeding and is fully qualified to make meaningful comment to this rule making.

### Nextel Has Conveniently Forgotten Its Roots

The basis for Nextel's proposal in comments is that additional consideration and special treatment is required to allow Nextel to compete with cellular and PCS operations, without further distraction from traditional SMR operators. Nextel's basis is fatally flawed from the outset. Nextel chooses to be placed on a level playing field with services which were not designed or intended to compete directly with SMR operations. Nextel, for all its puffery, is still inherently an SMR operator. The Commission should take this opportunity to remind Nextel of what it now would like to forget, its humble beginnings.

If the Commission believes that Nextel's system design is worthy of equal treatment with cellular and PCS operations, then the Commission may provide such treatment.<sup>1</sup> That is, the Commission may entertain a rule making by Nextel to create a spectrum allocation solely for use by ESMR operators. Frequencies will come available from the federal government which might be devoted to such service and Nextel may certainly petition for their use by ESMR operators. However, depositing hundreds of

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<sup>1</sup> Contrary to Nextel's claim, the Commission is not obligated to provide the requested regulatory parity. Section 6002(d)(3)(B) of the Omnibus Budget Reconciliation Act of 1993 provides that the Commission shall make such revisions and determinations in its regulations, "as may be necessary and practical to assure that licensees in [CMRS stations with the Private Radio Services] are subjected to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." (emphasis added). Accordingly, the Commission has sole discretion in determining whether any parity as to technical requirements are necessary and prudent as between similar services. Nothing within the legislation suggests that the Commission must or will entertain a request for spectrum reallocation.

SMR operators from their frequencies, demanding that the Commission engage in the licensing nightmare attendant to frequency exchanges, and creating exclusive territories where once were none, is not equal treatment. It is special, glorious treatment, above and beyond any ever requested by cellular and PCS operators.

In the meantime, Action respectfully recommends that the Commission point out to Nextel that the service in which Nextel operates is *ESMR*, not E-cellular or EPCS. Although Nextel might have employed its technology and rhetoric to gain an advantage over other SMR operators, the Commission's intent was to assist in making SMR more efficient, not the creation of a wholly new radio service.

Finally, were the Commission to determine that parity of the kind proposed by Nextel was reasonable and necessary, then the Commission must extend full parity. The reallocation of spectrum and creation of exclusive markets would require that Nextel compete with other applicants to provide the new service; and where such applications are found to be mutually exclusive, the Commission must hold an auction. See, 47 U.S.C. §309(j). Presumably included within that auction would be frequencies now held by Nextel in many markets. The Commission may well ask whether Nextel's request is supported by a necessary willingness by Nextel to place its own authorizations on the



block without compensation.<sup>2</sup> It is beyond doubt that other operators would not be so disposed.

### The Value Of The Marketplace

During the existence of Nextel nee Fleet Call, Inc., the market has been dominated by the normal dynamics of business. Companies which wanted to expand and had the resources to do so, either filed for additional frequencies or bought out other companies to facilitate extension into additional markets. Such is the normal expansion of business.

Fleet Call, Inc. requested a watershed waiver from the Commission, allowing it to gain several advantages in the marketplace which have had disastrous consequences for analog SMR operations. Grant of the waiver freed Nextel from two primary obligations imposed on other operators: (1) the requirement to load channels prior to requesting additional spectrum and (2) a construction period at least five times longer than traditional SMRs.<sup>3</sup> So while analog SMR operators continued to load and construct

---

<sup>2</sup> Action recognizes that Nextel's proposal, if enacted without revision, would allow Nextel to keep all that it has and provide it with additional spectrum in major markets to assure exclusive use of, at least, 200 channels. However, Action must assume that some amount of spectrum would be taken back from Nextel under its plan, in markets where it has not proposed ESMR service as yet. Whether Nextel intends this consequence is not clear by its comments.

<sup>3</sup> Action appreciates that some loading criteria exists for qualification to operate an ESMR system. However, it is apparent that the effect of such authority ameliorates against any normal loading criteria to the extent that the loading standards are, in effect, waived.

in accord with the rules, Nextel enjoyed the advantage of being able to file for and receive grant of hundreds of authorizations, without any requirement that its choice of frequencies or the quantities demanded be justified or even realistic.<sup>4</sup>

The result of the Commission's grant of a waiver to Nextel was a flood of applications, claiming frequencies for some future, speculative use by the giant. SMR operators within Nextel's claimed markets and for miles around, found themselves without spectrum to grow. Waiting lists expanded. And opportunities to provide one of the most successful radio services in Commission history, analog SMR, began to be quickly reduced in market after market.<sup>5</sup>

Nextel and other ESMR operators also began an aggressive program of short spacing, further cutting into traditional SMRs market areas. The squeeze continued unabated, as ESMRs played their games of "spectrum chess" among and around existing SMR systems, using traditional SMRs as their pawns. Money poured into the ESMR coffers from public offerings, equity deals with multi-billion dollar corporations, overseas

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<sup>4</sup> In one instance, Nextel applied for 120 frequencies to provide service to a county with less than 50,000 residents. One must assume that Nextel's complaints of "spectrum grabs" within its comments was a reference to its own voracious appetite.

<sup>5</sup> In the name of "emerging technology" a new, highly competitive entity was created, the ESMR. It is yet to be determined whether the competitive advantages granted to these entities resulted in greater or lesser competition in the delivery of wireless to services to the public. Taken from the perspective of an analog SMR operator, it is beyond question that the emergence of ESMR has lessened competition in the marketplace and reduced the number of alternative services and providers to consumers.

money from Japanese manufacturers, and any other well-heeled source that could pony up a few hundred million to be part of the ESMR phenomenon. What occurred was not the provision of service to the public,<sup>6</sup> but rather a trading in spectrum and a whirlwind of investment that was intended to produce stock sales and security deals more than build a viable radio service.

It appears to Action that Nextel has reached a crescendo in its security transactions, peaking in its sale of a percentage of its equity to MCI for over \$1.5 billion. It now must set itself to the task of actually creating a viable service to make good its claims to shareholders. But what of its claims? By its comments Nextel now admits that its business strategy might have had flaws and that its technological design is not as good as the Commission had been lead to expect when it granted its waiver.

The design of Nextel's digital receivers does not appear to be consistent with the radio environment in which they were to operate. That is, the receivers operate with a broad band "front end" that uses intermediate frequency sections to communicate with low power mobile units, relative to the ERP produced by traditional 800 MHz mobile and control equipment. Accordingly, the desired-to-undesired signal ratio is not consistent with the Commission's standards for operation of 800 MHz band equipment.

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<sup>6</sup> Nextel admits in its comments that despite its vast resources, it provides ESMR service to a scant 5,000 subscribers and the Commission might wish to confirm even this paltry claim. The Commission may further note that Nextel provides traditional services to thousands of additional end users. It would appear that based on the services provided, Nextel remains more an SMR than an ESMR to this very day.

If this is, indeed, the last hurdle to Nextel's success, Action suggests that Nextel is fully capable of devoting its vast resources to devising a technical solution to its self-imposed technical problem.

Neither the Commission nor traditional SMR operators, however, should be put in a position of guaranteeing Nextel's success. When Nextel accepted its licenses and all of the duties arising therefrom, Action did not agree to forego its own success so that Nextel might prosper. When the Commission granted Nextel's earlier waiver, it did not do so with the intent of insuring that Nextel would be successful. Instead, the Commission was giving Nextel an *opportunity* to be successful, no more than the Commission ever provides to a licensee.

Now Nextel admits that its earlier claims regarding the quality of its technology and the environment in which it might operate were inaccurate. Nextel promised the Commission that grant of its waiver would not require spectrum reallocation, and now it demands spectrum reallocation. Nextel claimed that it could deliver its service within the existing SMR environment, and now Nextel admits that its claims might not be true. The Commission should not be moved to assist this entity who has, thus, demonstrated that its claims are without foundation and whose technical abilities are beneath their estimations.

Action recommends that the Commission allow the marketplace to solve Nextel's newest woes. If Nextel requires additional spectrum within its markets, let it continue its path of purchase, so that existing operators receive full value for their businesses and not some reallocated dilution. If Nextel's problems require exclusive use of spectrum, it may request a separate rule making proceeding to solicit a block of spectrum from the Commission. If Nextel's problems lie in its choice of technology, Action suggests that Nextel use some of its vast resources to develop the technology which it claimed to the Commission would provide its services without the need to request spectrum reallocation.

#### The Commission Should Review Its Own Actions

To refresh its memory regarding the creation of ESMR operations and grant of the waiver which Fleet Call, now Nextel, requested, the Commission would be wise to review its earlier determinations in that matter. In its Memorandum Opinion and Order, File No. LMK-90036, 6 FCC Rcd. 1533, recon. denied, 6 FCC Rcd. 6989 (1991) (MO&O), in direct response to Fleet Call's claims, the Commission determined that

providing Fleet Call blanket protection from new co-channel licensees is not necessary to the implementation of its proposal. Our analysis shows that the current operation environment in these markets already provides Fleet Call with much of the protection it requires from new applicants. That is, the co-channel protection that is afforded all SMR licensees in these areas, including Fleet Call, essentially precludes the assignment of new stations. We therefore see no reason to place a formal restriction against new co-channel applications in Fleet Call's intended service areas.

*id.* at para. 17. Accordingly, the Commission, following careful review of Fleet Call's requests and claims, deemed that protection in excess of that provided under the rules

was not necessary to operate the system which Fleet Call claimed was totally feasible. Were this untrue, Fleet Call was well positioned to request reconsideration or to respectfully decline the waiver granted by the Commission. Fleet Call did neither and chose instead to finance, construct, and sell shares of stock to the public, consistently boasting that their ESMR system was a *fait accompli*, thanks to its technology. If Nextel's claims were and are in error, the error is solely Nextel's, who knew or should have known whether their system would perform as promised.

Perhaps of greater importance within the Commission's MO&O was is stated support for analog SMR operators and their need to exist, to grow, and to continue to be competitive in the marketplace. At para. 13 of the MO&O, the Commission stated, "we acknowledge the need to preserve for existing licensees in Fleet Call's markets both the protection from interference guaranteed them by our rules and the flexibility they too require..." It is apparent by the Commission's statements that it did not intend to sacrifice the vital analog SMR industry to the creation of ESMR operations. That same attitude should guide the Commission now, lest it be led to impose additional burdens on traditional SMR operators and their millions of subscribers, to create a limited benefit for a few operators serving fewer than ten thousand subscribers in a single market.

### Nextel's Authority Should Be Ratified

Nothing contained herein should be misinterpreted as a petition for reconsideration of the Commission's grant of Fleet Call, Inc.'s waiver. The time has passed for such protests. In fact, Action hereby requests that the Commission's action be a ratification of ESMR operation, without any further extension of Nextel or any other ESMR's privileges attained by such waivers. The industry has come too far in the last three years to turn back now.

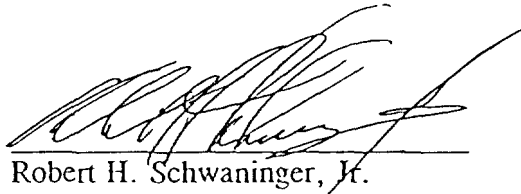
However, by the same token, Nextel should not now be allowed to employ this rule making as an opportunity to ask for reconsideration of the nature or extent of the advantages already afforded it by the Commission. Nextel has received what it asked for at a price which it must be willing to pay. The Commission should allow the SMR industry's (including ESMR operations) marketplace forces do what they can to solve Nextel's dilemma. This appears to be one time when less intrusion by the Commission is truly the best solution.

Conclusion

Action hereby respectfully requests that the Commission reject Nextel's comments and proposals as unfounded and unfair to existing operators who will suffer from grant of Nextel's requests. The Commission has already provided sufficient advantage for ESMR operators and nothing contained within Nextel's comments would justify additional special treatment.

Respectfully submitted,  
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Dated: July 11, 1994



**CERTIFICATE OF SERVICE**

I, Nakia M. Marks, hereby certify that on this 11th day of July, 1994, I caused a copy of the attached Reply Comments to be served by hand delivery or first-class mail, postage prepaid to the following:

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